

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
Teletouch Licenses, Inc.	)	Fee Control Nos.
Fee Payment for Notification of Permissive	)	000000BCB-97-054
Modification to Relocate the 152.57 MHz Base	)	9611088130542002
Station of Paging and Radiotelephone Service	)	
Station KNKD849 at Denton, Texas	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** July 24, 2001

**Released:** July 27, 2001

By the Commission:

1. This memorandum opinion and order denies an application for review filed by Teletouch Licenses, Inc. (TLI) of a letter ruling by the Acting Associate Managing Director for Operations (Managing Director).<sup>1</sup> That decision denied TLI's petition for reconsideration of a determination by the Billings and Collections Branch (Branch) that the \$45.00 fee payment associated with TLI's FCC Form 489 notification to the Commission of the relocation of base station KNKD849 was deficient by \$235.00. We find that TLI's FCC Form 489 notification was subject to a \$280.00 filing fee and that the payment was deficient by \$235.00. We direct TLI to remit the balance of the fee payment owed in the amount of \$235.00 within 30 days of this order.

Background

2. On November 7, 1996, TLI filed FCC Form 489 notifying the Commission that TLI had relocated the 152.57 MHz base station KNKD849 (a Paging and Radiotelephone Service station) to Denton, Texas (Form 489 notification). On December 17, 1996, the Branch determined that the \$45.00 fee payment associated with TLI's Form 489 notification was deficient by \$235.00 and the Branch assessed TLI the balance owed. In its petition for reconsideration of the Branch's action, TLI asserted that the relocation of its base station constituted a minor modification subject to a \$45.00 filing fee under section 8 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §158. In denying TLI's petition, the Managing Director determined that TLI's relocation of base station KNKD849 constituted a major modification subject to a \$280.00 filing fee under section 8 of the Act and section 1.1102(50)(b) of the Commission's rules, 47 C.F.R. §1.1102(50)(b).<sup>2</sup> TLI filed an application for review of that decision.

Discussion

3. We find that TLI's Form 489 notification is subject to a \$280.00 fee as a "Fill-in Transmitter" filing under section 8(g) of the Act, 47 U.S.C. §158(g), and section 1.1102(50)(c) of the

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<sup>1</sup> See Letter from Thomas M. Holleran, Acting Associate Managing Director for Operations, to Harold Mordkofsky, Esq. and Richard D. Rubino, Esq. (dated Mar. 27, 1998) (*Mar. 27 Letter Decision*).

<sup>2</sup> *Mar. 27 Letter Decision*.

rules, 47 C.F.R. §1.1102(50)(c).<sup>3</sup> Section 8 specifies separate fees for applications and other filings in, *inter alia*, the Domestic Public Land Mobile Stations services, including separate fees for fill-in transmitters, major modifications, and minor modifications.<sup>4</sup> The filing fees for fill-in transmitters, major modifications, and minor modifications for 1996 (the period at issue here) were \$280.00, \$280.00, and \$45.00, respectively, under Section 1.1102 of the Commission's rules.<sup>5</sup>

4. The applications and other filings subject to filing fees under section 8 are not defined in section 8 of the Act or in the Commission's rules implementing section 8 (*see* 47 C.F.R. Part 1, Subpart G). In 1990, however, the Common Carrier Bureau issued a Public Notice clarifying the term "fill-in transmitters" in the Domestic Public Land Mobile Service for purposes of section 8 of the Act and our implementing rules. In relevant part, the *Fill-in Transmitter Public Notice* stated that:

applicants proposing . . . to relocate an existing transmitter . . . such that the new contour is totally within the presently authorized service contour [as is the case here involving TLI's relocation of base station KNKD849], must pay [the fee established by the Commission for fill-in transmitters] (effective May 21, 1990).<sup>6</sup>

On April 24, 1996, the Wireless Telecommunications Bureau issued a *Memorandum Opinion and Order* reiterating that applicants proposing to relocate a base station (where the new contour is within the old contour) are required to pay the filing fee established for fill-in transmitters in the Commission's rules. TLI filed Form 489 on November 7, 1996 to notify the Commission that TLI had relocated base station KNKD849 and that the relocated transmission is wholly within the authorized service contour. We

<sup>3</sup> We agree with TLI that the Managing Director's decision that the relocation of TLI's station constituted a major modification subject to a \$280.00 filing fee under section 1.1102(50)(b) was based on the erroneous premise that the relocated station was a fixed (as opposed to a base) station. Although the basis of the Managing Director's decision was in error, we find, as reflected above, that TLI is required to pay the \$280.00 fee established for fill-in transmitters.

<sup>4</sup> *See* 47 U.S.C. §158(g), Schedule of Application Fees (Common Carrier Services, 2. Domestic Public Land Mobile Stations, c. Fill In Transmitters (per transmitter), b. Major Modifications (per transmitter), and c. Minor Modification (per transmitter)).

<sup>5</sup> *See* 47 C.F.R. §§1.1102(50)(c) (Fill in Transmitters), 1.1102(50)(b) (Major Modification), 1.1102(50)(h) (Minor Modifications); *see also* 47 U.S.C. §158(f) ("[t]he Commission shall assess and collect application fees at such rates as the Commission shall establish or at such modified rates as it shall establish pursuant to the provisions of subsection (b)"). This memorandum opinion and order refers to the rule sections in effect at the time TLI filed its Form 489 notification.

<sup>6</sup> *See Public Notice, Common Carrier Public Mobile Services Information, Clarification of Fees for Fill-in Transmitters*, Mimeo No. 3242 (dated May 18, 1990) (*Fill-in Transmitter Public Notice*) (noting that the term "fill-in transmitter" is defined in the legislative history underlying section 8 as a "transmitter operating within a presently authorized service contour such that the reliable service area does not exceed the already authorized service contour" (*quoting* Public Law No. 101-239, 103 Stat. 2106 (1989), H.R. Rept. No. 386, 101 Cong., 1<sup>st</sup> Sess. 20-28, 433-435 (1989), 135 Cong. Rec. H9333, H9613 (daily ed. Nov. 21, 1989)) (*Conference Report*)).

<sup>7</sup> *See State of New Hampshire, Memorandum Opinion and Order*, 11 FCC Rcd 5258, n.25 (WTB 1996) (*New Hampshire MO&O*) ("Commission policy requires an applicant that files a minor amendment to relocate a base station site, where the new contour is completely within the old contour, to pay a fee equivalent to a major amendment." (*citing Fill-in Transmitter Public Notice*)).

therefore find that, consistent with the *Fill-in Transmitter Public Notice* and the *New Hampshire MO&O*, TLI was required to pay the \$280.00 filing fee established for fill-in transmitters pursuant to section 8 of the Act and section 1.1102(50)(c) of the rules.

5. We disagree with TLI's assertion that the classification of fill-in transmitters as set forth in the *Fill-in Transmitter Public Notice* required public notice and comment under section 553 of the Administrative Procedure Act (APA), 5 U.S.C. §553, and that the definition is inconsistent with section 8 of the Act. Section 553(b)(3)(A) of the APA permits agencies to dispense with the usual notice and comment procedures in rulemakings if the rules are "interpretative rules."<sup>8</sup> Interpretative rules are agency statements of general effect in which the agency announces an interpretation of a statute or of another rule.<sup>9</sup> Interpretative rules thus serve an advisory function by explaining the meaning given to a particular word or phrase in a statute or rule that an agency administers.<sup>10</sup> The definition of the term fill-in transmitter in the *Fill-in Transmitter Public Notice* clarified the meaning of the term under section 8 of the Act, and did not create any new rights or duties or otherwise change existing rights and duties. We therefore find that the clarification of the term fill-in transmitter under the statute is an interpretative rule excepted from the notice and comment requirements under the APA. Moreover, this interpretation was reiterated in the Bureau's decision in the *New Hampshire MO&O*. We further find that, in the absence of a specific statutory definition in section 8, the *Fill-in Transmitter Public Notice* provided a reasonable clarification of the term fill-in transmitter and is consistent with the legislative history and congressional intent underlying the statutory fee schedule in section 8 of the Act.<sup>11</sup> In this regard, we note that TLI does not assert that it lacked actual notice of the clarification of the term fill-in transmitter as set forth in the public notice at the time that TLI filed its Form 489 notification.

6. Contrary to TLI's assertion,<sup>12</sup> the fact that TLI's base station relocation constituted a minor modification under sections 22.123 and 22.163 for purposes of the Part 22 rules<sup>13</sup> does not mean

<sup>8</sup> See 5 U.S.C. §553(b)(3)(A); see also 47 C.F.R. §1.412(b).

<sup>9</sup> *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 599 (D.C. Cir. 1973).

<sup>10</sup> See *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) ("The function of §553's first exemption, that for 'interpretive rules,' is to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."); see also *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952), ("regulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretive rules are statements as to what administrative officer thinks the statute or regulation means") (interpretative rules "do not have the full force and effect of a substantive rule but [are] in the form of an explanation of particular terms"); *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) ("an interpretive statement simply indicates an agency's reading of a statute or a rule. It does not intend to create new rights or duties"); *American Mining Congress*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (an interpretative statement may "suppl[y] crisper and more detailed lines than the authority being interpreted" without losing its exemption from notice and comment requirements under section 553).

<sup>11</sup> See *Conference Report*, 135 Cong. Rec. H9333, H9613 (defining the term fill-in transmitter) (see *supra* fn. 5).

<sup>12</sup> TLI Application for Review at 5.

<sup>13</sup> The Part 22 rules govern the licensing of domestic common carrier radio stations and their use in the Public Mobile Services. TLI's relocation of base station KNKD849 constitutes a minor modification under 47 C.F.R. §§22.123 and 22.163 and, as such, does not require prior Commission approval, unlike modifications classified as "major" under 47 C.F.R. §22.123 which do require prior Commission approval. See 47 C.F.R. §22.123(e) (setting forth the criteria for classifying filings in the Paging and Radiotelephone Service as major or minor); see also 47 (continued....)

that the relocation of base station KNKD849 is subject to the \$45.00 filing fee for minor modifications under section 1.1102(50)(h) of the rules governing filing fees. The separate statutory filing fee for fill-in applications is not dependent on whether the application constitutes a major amendment or a minor amendment. As discussed above, we have specifically stated that "within contour" relocations of existing base stations are subject to the filing fee established by the Commission for fill-in transmitters pursuant to section 8 of the Act. We have also stated that, although licensees file minor modifications for such relocations of base stations, they must pay a filing fee equivalent to a major amendment (i.e., the \$480.00 fee for fill-in transmitters).<sup>14</sup> The fact that the relocation of base station KNKD849 constitutes a minor modification for purposes of the Part 22 rules is therefore not relevant under the circumstances to determining the applicable filing fee under section 8 of the Act and section 1.1102 of the rules.

7. Also contrary to TLI's assertion, the fact that the Commission has not amended its application fee rules to specify that minor modifications that do not require prior Commission approval (such as TLI's Form 489 notification) are subject to a \$280.00 filing fee is not indicative that it would be allowable to accept a \$45.00 minor modification filing fee for "within contour" base station relocations. We stated in the *Fill-in Transmitter Public Notice* and reiterated in *New Hampshire MO&O* that such relocations constituted fill-in transmitters for purposes of the determining filing fees under section 8 of the Act and our implementing rules. Amendment of our rules was and is therefore unnecessary to specify that such relocations are subject to a \$280.00 filing fee.

8. ACCORDINGLY, IT IS ORDERED that the application for review filed on April 27, 1998 by Teletouch Licenses, Inc. IS DENIED.

9. IT IS FURTHER ORDERED that Teletouch Licenses, Inc. IS DIRECTED to remit the balance of the fee payment owed in the amount of \$235.00, and to file a completed FCC Form 159 ("Remittance Advice") within 30 days of the release of this memorandum opinion and order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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C.F.R. §22.163 ("[m]odifications to a station are minor if an application filed solely for the purpose of obtaining authorization for such modifications would not be classified as major in accordance with 47 C.F.R. §22.123").

<sup>14</sup> See *State of New Hampshire MO&O* at n.25 (as quoted *supra*); see also *Public Notice Clarifying Fill-in Transmitter Fees* (the filing fee for a fill-in transmitter (as the term includes the relocation of an existing, within contour transmitter) is equal to the filing fee for a major amendment).